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Farm Fresh Company, Target One, LLC and United Food and Commercial Workers Union, Local No. 99, AFL-CIO. Case 28-CA-100434

October 30, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On August 8, 2013, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent and the General Counsel each filed exceptions and a brief in support, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions

¹ The Respondent has not shown that the judge abused his discretion by granting the General Counsel's motion in limine to exclude direct questions about the alleged discriminatees' immigration status. The Respondent argued that this evidence was relevant to its defense that employees Maria Morales, Sylvia Romero, and Roberto Pena were not discharged but rather voluntarily quit. In affirming the judge's ruling, we note that the judge permitted the Respondent to ask questions that could support this defense without probing the employees' immigration status, including whether the employees resigned, whether they were concerned about having their work authorization reverified, and whether they resigned because of those concerns. Other evidence contradicted the Respondent's defense, particularly the credited testimony of Morales, Romero, and Pena that they were discharged by Production Manager Martin Loya.

In addition, the Respondent may raise the discriminatees' work authorization at the compliance stage of this proceeding. *Tuv Taam Corp.*, 340 NLRB 756, 761 (2003).

In addition to the rationale of the judge, Member Schiffer notes that even authorized employees may be chilled from exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (workers may be intimidated by the perception of scrutiny of their immigration status, fearing "that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding.") *cert. denied* 544 U.S. 905 (2005). Indeed, as the Board recently found, an employer's statements touching on immigration status warrant careful scrutiny as they are likely to instill fear among employees. See *Labriola Baking*, 361 NLRB No. 41, slip op. at 2-3 (2014). See also *Nortech Waste*, 336 NLRB 554, 554-555 (2001) (rejecting the employer's assertion that it reviewed its employees' immigration status merely to ensure its compliance with Federal immigration laws; finding instead that the employer used that review "as a smokescreen to retaliate for and to undermine the [u]nion's election victory.") The question of the discriminatees' immigration status is a matter properly addressed in compliance and does not bear on the determination of the existence of a violation of the Act. *Tuv Taam Corp.*, supra.

and to adopt the recommended Order as modified and set forth in full below.³

² The Respondent and the General Counsel have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Accordingly, we adopt the judge's credibility-based findings that the Respondent did not discharge or constructively discharge employee Blas Virelas, and did not violate the Act when new owner Gary Schrum decided, before the Respondent learned of employees' union activities, to reverify employees' work authorization when he acquired ownership. We also adopt the judge's findings discrediting the testimony of Production Manager Martin Loya and crediting that of the discharged employees in connection with the violations found.

There are no exceptions to the judge's findings that the Respondent, through Loya, violated Sec. 8(a)(1) of the Act by interrogating and threatening employees, giving employees the impression that their union activities were under surveillance, and engaging in surveillance of employees' union activities. There are also no exceptions to the judge's findings that the Respondent, through its owner Gary Schrum, violated Sec. 8(a)(1) of the Act by threatening employees at a March 26, 2013 meeting that they could be replaced if they supported the Union and went on strike, without distinguishing an economic strike from an unfair labor practice strike.

We agree with the judge, for the reasons he stated, that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Maria Morales, and Sec. 8(a)(3) and (1) of the Act by discharging employees Sylvia Romero, Roberto Pena, and Martha Aguirre. We agree with the judge that the General Counsel did not show that the Respondent was aware of Morales's union activities when it discharged her, and thus we adopt his dismissal of the allegation that Morales's discharge violated Sec. 8(a)(3). In agreeing with the judge's finding that Aguirre was unlawfully discharged, Members Miscimarra and Johnson do not pass on or adopt the judge's statement of the General Counsel's initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

We adopt the judge's dismissal of the allegation that the Respondent unlawfully solicited grievances and implicitly promised benefits if employees refrained from supporting the Union. After he became the Respondent's owner, Schrum met with employees individually and asked whether they had suggestions for making the company a better place. As the judge correctly found, however, in holding these meetings Schrum was following through with a plan that he announced to employees on his first day as owner of the company, *several days before* the Respondent learned that employees were engaging in union activity, to explain changes in wages he had already decided to make and to hear any complaints or concerns. We agree with the judge that the meetings were not in response to the organizing campaign, but simply the next step in a plan decided upon and announced before the Respondent knew about that campaign. Moreover, there is insufficient record evidence of what was said in these meetings to establish a violation of the Act.

³ We reject the Respondent's argument that the judge erred in awarding reinstatement and backpay to the discharged employees prior to verification of their authority to work in the United States. As the judge correctly concluded, determining the immigration status of the discriminatees should be left to compliance. See *Rogan Brothers Sanitation*, 357 NLRB No. 137, slip op. at 4 fn. 4 (2011) (leaving to compliance "questions concerning the effect, if any, of the discriminatees' immigration status on the reinstatement and make whole remedies");

Tuv Taam Corp., supra at 760 (leaving immigration status to compliance where immigration status did “not bear on whether the Respondent engaged in the unlawful conduct alleged in the reissued complaints,” nor on “the remedy to be ordered at this stage of the proceedings for the unlawful conduct found”).

We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language and in accordance with our decision in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). The Respondent has not excepted to the judge’s recommended notice-reading requirement, but in any event we find the judge’s remedy appropriate given the Respondent’s serious and widespread unfair labor practices. See, e.g., *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) (ordering notice reading “so that employees fully perceive that the [r]espondent and its managers are bound by the requirements of the Act”), rev. denied 400 F.3d 920 (D.C. Cir. 2005). Also in agreement with the judge, Members Miscimarra and Johnson do not find the other extraordinary remedies requested by the General Counsel to be warranted. They note that Martin Loya, who perpetrated most of the unfair labor practices here, had left his supervisory position by the time of the hearing, and that Gary Schrum has since passed away. Such high-level changes lend further support to the judge’s determination that traditional remedies, plus notice reading, will sufficiently ameliorate the effects of the Respondent’s unfair labor practices. See *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

In addition to the notice-reading requirement and other make-whole remedies, Member Schiffer would grant the General Counsel’s request and order the provision of employee names and contact information to the Union. Further, relying on the Board’s authority sua sponte to determine an appropriate remedy for the violations found, see *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), enf. 354 F.3d 534 (6th Cir. 2004), she would also order a notice mailing. Here, the Respondent engaged in a particularly swift, harsh, and targeted response to the workers’ organizing efforts and did so early in the union organizing process. It targeted nearly all the employee leaders in the organizing effort (a significant portion of this relatively small work force), asserting the obvious pretext that those leaders quit their employment rather than submit to the e-Verify process. This made it clear to the remaining employees that prounion activity would be punished. The provision of employees’ names and addresses to the Union would allow it to reach out to remaining employees directly and begin to restore employees’ willingness to engage in protected activities should they so choose. Member Schiffer is not convinced by the Respondent’s argument that owner Schrum’s death, and the fact that Martin Loya is no longer in a supervisory position, obviate the need for this remedy; rather, she concludes that employees are likely to view the company and its management as a whole rather than distinguishing between individuals. Further, she rejects the notion that the lingering impact of such a swift and vicious purge of unionization advocates will be dissipated simply by the absence of specific managers. Their removal due to circumstances unrelated to the organizing efforts is unlikely to have any positive effect in restoring employees’ faith in their right to engage in Sec. 7-protected activities without retribution. Regarding the notice mailing, Member Schiffer observes that the discriminatees were terminated and are unlikely to return to the facility to view the notice and learn the details of the violations. The concern is equally grave for the other employees at the facility. Because the Respondent engaged in clear surveillance—including statements by an observing supervisor that he knew an employee signed a card—the remaining employees would be less likely to risk pausing to read the Board’s notice at the facility. A notice mailing would allow them to understand the violation and their rights in the privacy of their homes.

ORDER

The Respondent, Farm Fresh Company, Target One, LLC, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Food and Commercial Workers Union, Local No. 99, AFL–CIO or any other union.

(b) Discharging or otherwise discriminating against any employee for engaging in concerted activities protected by Section 7 of the Act.

(c) Coercively interrogating employees about their union membership, activities and sympathies.

(d) Threatening to discharge employees because they signed union authorization cards.

(e) Threatening to refuse to assist employees if they supported the Union.

(f) Creating the impression that it is engaged in surveillance of its employees’ union or other protected concerted activities.

(g) Placing employees under surveillance while they engage in union or other protected concerted activities.

(h) Threatening employees that they could be permanently replaced if they supported the Union and went on strike.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision.

(c) Compensate Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero for the adverse income tax consequences, if any, of receiving lump-sum backpay awards, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful dis-

charges, and within 3 days thereafter, notify Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix"⁴ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 2013.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix" shall be read to employees in both English and Spanish by Respondent's owner or, at Respondent's option, by a Board agent in Respondent's owner's presence.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. October 30, 2014

Philip A. Miscimarra,	Member
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Harry I. Johnson, III,	Member
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Nancy Schiffer,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the United Food and Commercial Workers Union, Local No. 99, AFL-CIO or any other union.

WE WILL NOT discharge or otherwise discriminate against you for engaging in concerted activities protected by Section 7 of the Act.

WE WILL NOT coercively interrogate you about your union membership, activities and sympathies.

WE WILL NOT threaten to discharge you because you signed union authorization cards.

WE WILL NOT threaten to refuse to assist you if you support the Union.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT threaten you that you could be permanently replaced if you support the Union and go on strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero for the adverse income tax consequences, if any, of receiving one or more lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter, notify Martha Aguirre, Maria Morales, Roberto Pena, and Sylvia Romero in writing that this has been done and that the discharges will not be used against them in any way.

FARM FRESH COMPANY, TARGET ONE, LLC

The Board's decision can be found at www.nlrb.gov/case/28-CA-100434 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Sandra L. Lyons, Esq., for the Acting General Counsel.
Christopher J. Meister, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Phoenix, Arizona on June 11–14, 2013. The United Food and Commercial Workers Union, Local No. 99, AFL–CIO (the Union) filed the charge on March 15, 2013.¹ The Acting General Counsel issued the complaint on May 10, 2013, and amended the complaint on June 5 and 12, 2013.

The complaint alleges that Farm Fresh Company, Target One, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by:

(a) On or about March 6, 2013: interrogating employees about their union membership, activities and sympathies; and telling employees that it knew they had signed union authorization cards, thereby creating an impression that employee union activities were under surveillance.

(b) On or about March 8, 2013: telling employees that it knew they had signed union authorization cards, thereby creating an impression that employee union activities were under surveillance; threatening employees with discharge because they signed union authorization cards; threatening to refuse to assist employees because they signed union authorization cards; and refusing to assist employees because they signed union authorization cards.

(c) From on or about March 4 to 8: soliciting employee complaints and grievances, and thereby promising its employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities; promising its employees improved terms and conditions of employment if they refrained from engaging in union or other concerted activities; and granting employees increased benefits and pay to dissuade them from engaging in union or other concerted activities.

(d) On or about March 15, 2013, engaging in surveillance of employees engaged in union activities.

(e) On or about March 26, 2013: soliciting employee complaints and grievances, and thereby promising its employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities; threatening employees with discharge if they selected the union as their collective-bargaining representative; and promising its employees to change their working conditions if they refrained from engaging in union or other concerted activities.

The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) On or about March 1, requiring existing employees to submit new I-9 forms to re-verify their work authorization through the E-Verify system, and thereby causing the discharge of the following employees on the following dates be-

¹ All dates are in 2013 unless otherwise indicated.

cause they formed, joined and assisted the Union and engaged in concerted activities, and to discourage other employees from engaging in similar activities:

- a. Martha Aguirre (March 6 discharge);
- b. Maria Morales (March 5);
- c. Robert Pena (March 6); and
- d. Sylvia Romero (March 6).

(b) On or about March 7, informing employee Blas Virelas that Respondent had received a no-match letter from the Social Security Administration, and giving Virelas one week to resolve the discrepancy, and thereby causing Virelas' discharge on March 13, 2013, because he formed, joined and assisted the Union and engaged in concerted activities, and to discourage other employees from engaging in similar activities.

Respondent filed a timely answer denying the alleged violations in the complaint.²

Before trial, the Acting General Counsel filed a motion to preclude Respondent from questioning witnesses about their immigration status. Respondent opposed the Acting General Counsel's motion. At the start of trial, I granted the Acting General Counsel's motion. As I explained, while Respondent has an interest in presenting its case and demonstrating as part of its defense that the alleged discriminatees voluntarily resigned to avoid going through the E-Verify process, I found that Respondent could present that defense without questioning witnesses about their immigration status. I also noted that the public has an interest in maintaining the integrity of proceedings before the Board, and that the Board has recognized that "formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights." *Flaum Appetizing Corp.*, 357 NLRB No. 162, slip op. at 7 (2012) (noting that even documented workers might be chilled from exercising their statutory rights); see also *Tuv Taam Corp.*, 340 NLRB 756, 761 (2003) (explaining that where immigration status has no bearing on whether the respondent committed the alleged unfair labor practices, questions regarding an employee's immigration status must be litigated at the compliance stage). Given the legal and factual issues at stake in this case, and Respondent's ability to present its defense without asking witnesses about their immigration status, I found that the public interest in protecting the integrity of Board proceedings outweighed Respondent's interest in asking witnesses about their immigration status at the liability stage of proceedings. (Transcript (Tr.) 27–32.)

On the entire record,³ including my observation of the de-

meanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, packages fresh produce for sale at its facility in Phoenix, Arizona. Based on a projection since about March 1, 2013, when Respondent commenced its operations, Respondent will purchase and receive at its Phoenix, Arizona facility, goods valued in excess of \$50,000 from other enterprises that are located within the State of Arizona, but receive the goods directly from points outside the State of Arizona. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Company overview

As noted above, Respondent packages fresh produce for sale, including items such as carrot sticks, celery sticks, coleslaw, lettuce, cabbage, salads and fresh fruit (cantaloupe, honeydew and watermelon). To carry out its operations, Respondent relies on 2 shipping and receiving employees to handle produce deliveries and shipments, and approximately 48 production employees to clean, cut and package the produce in the processing room. (Tr. 45–49, 135–136.) In March 2013, 90 percent of Respondent's employees only spoke Spanish. (Tr. 80.)

In the years leading up to 2013, David Prince owned a controlling interest in Farm Fresh, and served as the Company's president. (Tr. 130.) In the same timeframe (up to February 28, 2013), Gary Schrum served as Farm Fresh's general manager, while Jesus Martin Loya filled the role of production supervisor. Arturo Sousa served as the office manager. (Tr. 44, 155–156, 175, 196–198, 237–238, 687, 697–698.)

Farm Fresh is generally open six days a week (Monday through Saturday), with employees punching a time clock and beginning their shifts as early as 3:30 am, and working until they are released in the late morning or early afternoon. (Tr. 55, 61, 151, 160, 276, 298.) Although the Farm Fresh facility has two floors and a basement, almost all activities occur on the main floor (a/k/a the production floor), where the processing room, coolers, main office and warehouse are located. The second floor does have some additional office space, as well as a small balcony and an employee break area.⁴ (Tr. 58–60, 63–64.) Individuals in the main floor office can see the processing room through a window in the office, but generally cannot hear what is being said in the processing room because of machine noise and because the office door usually remains closed to maintain the cool temperature in the processing room. (Tr. 61, 155, 694.) As the production supervisor, Loya was frequently

² In its answer, Respondent asserted that neither the Board nor the Acting General Counsel had authority to act in this case because two Board Members and the Acting General Counsel were not lawfully appointed to their positions. (GC Exh. 1(e), p. 3.) I hereby deny relief on Respondent's arguments because the Board rejected identical arguments in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1–2 fn. 1 (2013), and I am bound to follow that decision.

³ The transcripts in this case are generally accurate, but I hereby make the following corrections to the record: page 28, line 17: "shell" should be "chill"; page 222, lines 23–24: "deny" should be "admit"; page 400, line 11: "viability" should be "liability"; page 504, line 9:

"subjective" should be "objective"; page 529, line 24: "world" should be "Board"; page 635, line 11: "a few" should be "view"; and page 650, line 4: "belabor" should be "elaborate."

⁴ The basement is generally used for storage. (Tr. 59.)

on the production floor to supervise employees. (Tr. 74–75, 155–156, 237–238.)

2. Planning for an expected change in ownership

In fall 2012, Prince decided that he was ready for a change from running Farm Fresh’s operations, and decided to sell the Company to Schrum. (Tr. 162.) Initially, Prince and Schrum attempted to complete the sale in December 2012. The sale was not completed, however, until February 28, 2013. (Tr. 162.)

B. Working Conditions and Initial Protected Activity

History of employee concerns about working conditions

For several years at the Company, up to and including March 2013, employees endured very difficult working conditions. Specifically, apart from the normal demands of production work, employees had to endure remarks and conduct by Loya that they viewed as abusive. For example, Loya would often urge employees to work faster, and with that aim in mind, would snap his fingers, clap his hands or pound on the table. Loya also made assorted insulting comments to employees that he did not believe were working quickly enough, including:

calling employees lazy, old hags, dumb, inept or assholes;
telling employees that they were old and should quit to give younger replacement workers a chance to do their jobs;
telling employees that they were good for nothing and that the Company was going to have to bring in robots to replace them; and
complaining that employees were always at the doctor’s office, and telling employees that they should start saving for their funerals so they would not have to do a carwash to cover funeral expenses.⁵

(Tr. 245, 299–300, 332–333, 374–375, 414–415, 431, 451–452, 478–479, 510, 515; R. Exhs. 1, 5.)⁶ In addition, Loya targeted some employees (discriminatee Sylvia Romero being one of them) for remarks and conduct of a sexual nature. For example, Loya:

touched certain female employees on the buttocks (Romero and others) and breast (Romero);
told employees that they should make love every morning so they would have the desire to work;
told male employees “grab my head, but the lower head”;
pointed at his crotch and told male employees “come and sit

here and then take a spin on it”;
pointed at his crotch and said “take this one with you” when a female employee stated that she was going to the bathroom;
called Romero a hot mama, and said he was going to take her home and do things to her; and
asked Romero if she had ever done oral sex, and offered to teach her how.

(Tr. 360, 369–371, 478–480; R. Exh. 3.)⁷ Employees, including Aguirre, Romero and Maria Morales, would talk at work (in the break room or around the celery processing table) about some of these working conditions and about how they might address their concerns. (Tr. 300–302, 375, 453–454, 481–482; see also Tr. 302 (noting that employees were not sure what to do because they did not know their rights).)

2. February 2013 workplace incidents

On February 10, Morales was cutting celery at the celery table. When Loya stopped by the table and observed that some of the celery stalks were longer than others, he grabbed them and threw them at Morales’ face. The following verbal exchange then occurred:

Morales: The next time that you throw celery at my face, I’m going to return this right back to you.

Loya: I’m gonna see you on the 1st of March⁸ to see if it is true, if you’re gonna throw that celery back in my face.

(Tr. 482–483.)

On February 16, Morales, Romero, Aguirre and approximately three other employees were working at the celery table when Loya approached and told the workers to hurry up because the truck had arrived to pick up the celery. Loya began slamming the table and clapping his hands to emphasize his point, and then announced that Morales, Aguirre and one other employee would be responsible for carrying the 150 pound barrels of celery while the three other employees handled the packaging.⁹ The following discussion then occurred:

Loya: I told you that you were old hags and I’m gonna change you out for new people, younger people.

Morales: All you need now is just a whip in your hands so you can whip our asses.

⁷ Loya generally engaged in his misconduct towards Romero when she was alone in one of the coolers. (Tr. 370.) In 2011, Romero complained to Prince about Loya’s misconduct. Loya “calmed down” for approximately three months, and then resumed his sexual behavior towards Romero. (Tr. 371–373.)

⁸ March 1st was significant because it would be the day that Prince and Schrum announced that Schrum was buying the Company. Loya was aware of the forthcoming purchase because Schrum advised him of his plans to buy the Company when he spoke with Loya in January 2013. (Tr. 246.)

⁹ Normally, all six of the employees at the celery table took turns carrying the barrels because that assignment was particularly difficult. (Tr. 303, 377–378.)

⁵ Discriminatee Martha Aguirre was particularly stung by Loya’s remark about saving for funerals, because one year earlier, Aguirre and her family had to do a carwash to raise money for Aguirre’s son’s funeral. (Tr. 299–300, 333; see also Tr. 269–270 (Loya admitted that Aguirre’s husband complained to Loya about the remark).)

⁶ Employees also had concerns about Loya’s wife, who also worked as a production employee but had engaged in misconduct towards other employees. Specifically, Ms. Loya grabbed and shook at least one coworker (Roberto Pena), and also yelled at other employees. (Tr. 452–453, 469–471, 501, 514; see also Tr. 146, 243–244 (employee complaints about Ms. Loya).) In January or February 2013, Loya fired Pena after the incident with Ms. Loya (in which Ms. Loya shook Pena), but Schrum spoke to Prince about the issue and ultimately Pena was reinstated. (Tr. 469–471, 501–502.)

Loya: If you don't like the way I treat you, well then, there's the doors wide open, so you can leave. Here with me, you will obey orders, rules and policies, because I'm the one who is in charge here.

Aguirre: You know what, accept the consequences, Martin.

Morales: Perhaps inside here, there is no rules, there's no laws . . . but outside of here, I will find laws, rules and opportunities for work outside of here and for you.

(Tr. 302–304, 375–378, 483–485.)¹⁰

3. Aguirre decides to contact the Union

Later on February 16 (after the incident with Loya), Morales and Aguirre talked about finding an attorney who could help them address the working conditions at the Company. (Tr. 486.) After Aguirre spoke to her son, Ricardo Aguirre (Ricardo), about the problems she was having at work, Ricardo called an attorney and left a message to ask what kind of assistance might be available. (Tr. 305, 380, 559.)

4. February 26 – Aguirre and Romero meet with the Union

On February 26, Ricardo received a return phone call from the attorney he contacted. After Ricardo explained the situation, the attorney suggested that the employees talk to the Union, and took down Aguirre's contact information to pass along to a Union representative. (Tr. 305–306, 380, 559.) Later that same day, union organizer Martin Hernandez called Ricardo and agreed to meet with Aguirre, Aguirre's husband, Romero and Ricardo in their home that evening.¹¹ (Tr. 380, 520, 560.)

In the evening on February 26, Hernandez met with Aguirre, Romero and their husbands as promised. After hearing Aguirre's and Romero's descriptions of the working conditions at Respondent's facility, Hernandez explained that the Union could be of some assistance, but first Aguirre and Romero would need to encourage their coworkers to join them in supporting the Union. To that end, Hernandez provided Aguirre and Romero with union cards for their coworkers. The group also agreed to reconvene on March 2 for a followup meeting to discuss the Union. (Tr. 306–308, 380–382, 520–522, 560–561.)

5. February 27 – Aguirre and Romero talk to coworkers about supporting the Union

On February 27, both Aguirre and Romero spoke to their coworkers about the potential benefits of supporting the Union. Aguirre and Romero held similar conversations with their coworkers throughout the week, with the conversations occurring at the celery processing table and in the parking lot at the end of their shifts. (Tr. 308–310, 383–384.)

¹⁰ Loya denied both the February 10 argument with Morales and the February 16 argument with Aguirre and Morales. (Tr. 246.) I have credited Aguirre and Morales' testimony because much of their testimony was corroborated, and each of them testified in detail about the incidents in question. Loya, by contrast, offered only a general denial.

¹¹ Ricardo and Romero are married, and thus Romero is Aguirre's daughter-in-law. (Tr. 84.)

C. Schrum Buys Farm Fresh – Becomes New Owner

1. February 28 – sale/purchase of Farm Fresh completed

On February 28, Schrum bought Farm Fresh from Prince (and other shareholders) via an asset purchase agreement.¹² Although the parties completed the sale in the afternoon on February 28, the parties agreed that the closing was effective as of 12:01 a.m. on February 28 and that Prince terminated all employees as of that same date and time. The parties also agreed that Schrum was responsible for any payments owed to employees for work that they performed on or after February 28. (Tr. 67–68, 162–163, 168–170; GC Exh. 2, sections 1.3(d), 1.5, 3.7.)

2. Schrum decides to run all employees through E-Verify

When Prince owned Farm Fresh, he took the lead on ensuring that Company employees were authorized to work. Specifically, Prince kept track of employee I-9 forms in a safe by his desk, and occasionally (with Schrum's and Loya's assistance) would ask certain employees to update their paperwork. (Tr. 148–151, 213, 358; see also Tr. 150 (noting that Prince did not have a set plan for making sure that employees' I-9 forms and other paperwork were up to date).)¹³

At some point before purchasing Farm Fresh, Schrum spoke to an employee with the Department of Homeland Security by telephone. Based on that telephone conversation, Schrum believed that once he became the new owner of the Company, he had the option of either retaining all existing employees based on their old I-9 forms (and using E-Verify only for new hires), or treating all employees as new hires and having all of them go through the E-Verify system.¹⁴ (Tr. 82, 702–703.)

¹² Schrum made the purchase under the business entity "Farm Fresh Company, Target One LLC," while Prince handled the transaction under the business entity "Farm Fresh Company, Inc." In this decision, unless otherwise stated, I use the terms Farm Fresh and the Company interchangeably for both entities.

¹³ At some point after the year 2000 (when Prince still owned the Company), immigration authorities subpoenaed Farm Fresh's I-9 forms for review, and subsequently notified Prince that he had several employees who were not legally authorized to work. The immigration authorities gave Prince approximately one week to "get rid of" the unauthorized workers. (Tr. 174–175.)

¹⁴ While the Acting General Counsel correctly pointed out that Respondent was not required to treat all employees as new hires and run them through E-Verify, the Acting General Counsel did not rebut Schrum's testimony that he could voluntarily choose to treat all employees as new hires and run them through E-Verify. (See 8 CFR § 274a.2(b)(1)(i) (I-9 forms are required for new hires)); GC Br. at 30 (citing 8 CFR § 274a.2(b)(1)(viii)(A)(7) (explaining that an individual will not be deemed a new hire if the individual continues his employment with a successor or related employer that obtains and maintains the previous employer's records).)

Also on the issue of I-9 forms, the Acting General Counsel argued that I should draw an adverse inference against Respondent because it did not produce the old I-9 forms that Prince described. (GC Br. at 31.) I decline to draw such an adverse inference because, among other reasons, the Acting General Counsel did not develop the record sufficiently to show that Respondent still had the old I-9 forms in its possession. Specifically, while Prince did testify about his procedure for retaining the I-9 forms, the Acting General Counsel did not show that Respondent retained those forms after Prince sold the Company (thus leaving

3. March 1 – Schrum and Prince notify employees of change in ownership

In connection with buying the Company, Schrum intended to treat all employees as new hires, and have the option to select which employees to retain for his new company. (Tr. 701–702; see also R. Exh. 11.) However, Schrum did not use any formalized process for selecting which of Prince’s employees to “hire” to work for Respondent – instead, all employees simply showed up for their scheduled shifts and worked their usual jobs as if nothing had changed. (Tr. 75–77, 163–164, 180, 211–212, 313, 455, 486–487.)

In mid-morning on March 1, Schrum and Prince asked all employees to attend a meeting in the second floor break room. Using Loya as a translator, Prince told employees that he was selling the Company to Schrum, advised employees that he would be issuing their last checks with vacation pay included, and thanked them for their service. Schrum also spoke (using Loya as a translator), and stated that he would be running all employees through the E-Verify system to ensure that they were eligible to work. In addition, Schrum announced that he planned to meet with employees within the next week to discuss the sale, changes that he would be making at the Company, pay rates, and any questions or concerns that employees had. Schrum also stated that he expected to prepare a handbook with new rules and procedures, and notified employees that he would likely do away with bonuses, but offset that by increasing employee wages.¹⁵ After the meeting, all employees returned to work and completed their shifts. (Tr. 77–82, 162–165, 246–247, 310–313, 357, 387–388, 416, 435, 455–456, 487–489, 648–649, 713–714.)

D. March 2–5 – Union Activity Continues

1. March 2 – a second Union meeting at Aguirre’s home

After the work day concluded on March 2, Aguirre, Morales, Romero and certain other employees met at Aguirre’s home for another meeting with the Union (represented by Hernandez and union organizer Efrain Sanchez). The employees voiced their concerns about the working environment at Farm Fresh, and afterwards, the Union explained the assistance that it could provide and gave the employees union authorization cards, which Aguirre, Romero, Morales and other employees signed. The Union also encouraged the employees to continue speaking to their coworkers to build support for the Union, and gave them blank union authorization cards for their coworkers to sign. Sanchez also advised employees that he planned to come to Farm Fresh on March 4 (the following Monday) to talk to

open the possibility that the forms were inadvertently misplaced or destroyed).

¹⁵ When Prince owned the Company, he paid employees bonuses in September based on the profits of the Company in the preceding twelve months. Schrum explained that he was concerned about continuing this practice after he purchased the Company because he assumed ownership in March, and thus would only have six months to accumulate profits from which bonuses would be paid. Accordingly, Schrum decided to do away with bonuses altogether, and instead increase employee wages to compensate for the lack of bonuses. At least for the first year, the increase in wages that employees would receive promised to be less than the bonuses they were losing. (Tr. 714–715.)

employees, and that he also would schedule a meeting in the evening on March 4 at the union hall so Farm Fresh employees could learn more about the Union. (Tr. 313–315, 385–386, 489–491, 522–525, 561–562, 591–595.)

2. March 4 – organizing meeting at the Union hall

On March 4, Aguirre, Morales and Romero reported to their usual shifts at work. Over the course of the day, Aguirre, Morales and Romero spoke with various employees (including employee Roberto Pena) about supporting the Union, distributed union cards, and invited employees to attend a meeting with union organizers that evening. (Tr. 316–317, 352, 386–387, 456–457, 491–492; see also Tr. 316 (conversations occurred at the celery processing table and in the parking lot).) Union organizer Sanchez drove to Farm Fresh in the morning to speak to employees, but left before doing so because he was called away to handle another union matter. Before leaving Farm Fresh, Sanchez notified Ricardo that his plans had changed. Ricardo therefore did not speak to employees about the Union at the Farm Fresh facility on March 4. (Tr. 562–563, 595.)

Later on March 4 (at approximately 5 p.m.), Aguirre, Morales, Romero, employee Blas Virelas, and other employees attended a meeting with union representatives at the union hall. Virelas and at least one other employee signed union authorization cards at the meeting. (Tr. 317–318, 389–390, 417–418, 430, 492–494, 596.)

3. March 5

a. Schrum begins one-on-one meetings with employees

On March 5, Schrum began meeting with employees one-on-one in his second floor office. Loya directed individual employees to report to Schrum’s office, where Schrum and Yvonne Ortiz were waiting (Ortiz worked for another company, and was present to serve as an interpreter for Spanish-speaking employees). During these meetings, Schrum reiterated that he would not be paying employee bonuses, and advised employees of the raise they would be receiving (ranging from an increase of 25 cents to \$2 dollars per hour, depending on what job the employee performed) to offset the lack of bonuses. Schrum also asked employees if they were happy and if they had any suggestions for making Farm Fresh a better place.

In the meetings, Schrum heard at least one complaint that the raise he was offering was too low. Schrum also heard multiple complaints about Ms. Loya and the way that she treated employees.¹⁶ Schrum continued these one-on-one meetings throughout the month of March, but did not meet with any of the discriminatees during that time frame. (Tr. 81–82, 96–101, 106–107, 232–233, 723, 726, 731–734, 739–742.)

b. Union representatives speak with employees at Farm Fresh facility

At approximately 11 a.m. on March 5, union representatives Efrain Sanchez and Leobaldo Hernandez (Leobaldo) went to the Farm Fresh facility, where they were joined by Ricardo. Sanchez was wearing a black union vest with the letters

¹⁶ Schrum did not receive any complaints about Loya during the one-on-one meetings beyond comments that Loya was “tough but fair.” (Tr. 725.)

“UFCW” in large print on the back, while Leobaldo was wearing a polo shirt with “UFCW” letters on the upper-left front. When employees came outside after their shifts, Sanchez, Leobaldo and Ricardo spread out to talk to them about supporting the union, and asked employees to sign union authorization cards. Roberto Pena was one of the employees who spoke to the union representatives. Pena signed a union authorization card in front of the Farm Fresh facility. (Tr. 318–321, 391–392, 457–460, 563–570, 596–600; see also GC Exhs. 4, 12 (photographs showing the area where union representatives spoke to employees in front of the Farm Fresh facility).)

While Pena was speaking to one of the union representatives, Ricardo went across the street to his car to obtain more union authorization cards. From his car, Ricardo, saw Loya and Sousa walk towards the Farm Fresh gate and look around to see who was outside and what was happening in front of the Farm Fresh facility.¹⁷ (Tr. 567–569; GC Exh. 7 (photograph showing Loya’s and Sousa’s location when they were outside).) I find that it was at this point that Respondent, through Loya and Sousa, learned about the Union organizing campaign.¹⁸

E. March 5 and 6 – Respondent Terminates Morales, Aguirre and Romero

1. Maria Morales

Maria Morales began working as a production employee for Farm Fresh on November 3, 2003. Morales typically worked between 50 and 65 hours per week (Monday through Saturday), and normally started her shift at 3:30 a.m. and finished her shift between 11:30 a.m. and 1 p.m. (depending on when Loya, her supervisor, released employees for the day). (Tr. 476–477.)

On March 5, Morales began her shift at 3:30 a.m. At 7 a.m., Morales told Loya that she needed to leave work to attend an appointment at her daughter’s school. Loya initially said okay to Morales, but moments later approached her at her locker and

told her, “You have no more work.”¹⁹ Morales did not respond to Loya. Instead, she grabbed her things and left the facility. (Tr. 494–495.)

At some point after Morales departed, Loya informed Schrum that Morales resigned her job because she could not pass the E-Verify process, and Schrum relied on Loya’s report. (Tr. 708.) Loya also wrote on Morales’ attendance sheet that Morales quit on March 2. Loya admitted at trial, however, that Morales worked after March 2. (Tr. 683–684; R. Exh. 7.)

2. Martha Aguirre

a. Background

Martha Aguirre began working for Farm Fresh as a production employee on September 13, 1989. Typically, Aguirre worked 46–48 hours per week (Monday through Saturday), with her shift beginning at 3:30 a.m. and ending between 11 a.m. and 12:30 p.m. (depending on when Loya, her supervisor, released employees). (Tr. 83, 297–299.)

b. January/February 2013 - history of tardy arrivals and absences due to illness

Although Aguirre was expected to start her shift at 3:30 a.m., she had a track record in January and February 2013 of arriving 5 or more minutes late, as indicated by the entries on her time clock punch card. Specifically, between January 3 and February 27, Aguirre punched in 5 or more minutes late on eighteen occasions. (Tr. 346–349; R. Exh. 2.) Aguirre was never disciplined for being late. Instead, at most, Loya would tell her to arrive earlier. (Tr. 326–327, 365.)

In February 2013, Aguirre was sick and missed eight work days from February 1 through 9 (Aguirre was in the hospital for part of this time period). At Aguirre’s request, Ricardo verbally informed Loya on multiple occasions during Aguirre’s absence that Aguirre was sick and unable to work.²⁰ Loya generally responded, “I guess I’m gonna have to wait until she comes back.” (Tr. 180, 255, 324, 326, 351, 575–576, 588; GC Exh. 11; R. Exh. 2.) Aguirre was also out sick on February 18, but

¹⁷ Ricardo and Sanchez also saw employee M.T. sitting in her car and looking in her rearview mirror to observe what the union representatives and Ricardo were doing. Employee M.T. was nearby and looking in Pena’s direction when Pena signed his union authorization card. Employee M.T. has a friendly relationship with Loya. There is no direct evidence, however, that employee M.T. told Loya about her observations on March 5. (Tr. 459–460, 465, 473, 570, 600.)

¹⁸ I have not credited Schrum’s, Loya’s and Sousa’s testimony that they did not learn about the Union’s presence in front of Farm Fresh until March 7. As a preliminary matter, neither Loya nor Sousa rebutted Ricardo’s testimony that he saw them looking around outside the facility (while Pena was speaking to Union organizers) on March 5. Beyond that point, the Union’s arrival at Farm Fresh was a significant development, and I find it implausible that Respondent would not have been aware of the Union’s activities on its doorstep. Indeed, Schrum and Loya each testified that it was Respondent’s employees that tipped them off about the Union’s presence—it is not plausible that employees would have waited two days to report the Union’s arrival. (Tr. 107, 647, 665, 711; see also Tr. 111–112, 125–126; GC Exh. 7 (Schrum testified that he frequently comes out to the second floor balcony (above where the union representatives were speaking to employees) or out to the parking lot gate and front of the building for smoking breaks); Findings of Fact, Section II(G)(1), *infra* (noting that on March 6, the next day after learning about the organizing campaign, Loya spoke to both Pena and Virelas about whether they signed union authorization cards).)

¹⁹ Respondent argues in its brief that Loya did not have the authority to terminate employees. (R. Br. at 10.) That argument is not persuasive because even if Loya needed Schrum’s approval to terminate someone, the fact remains that Loya was Respondent’s production supervisor and Schrum relied on Loya to recommend and carry out employee discipline and discharges. Thus, at a minimum, Loya had apparent authority to act on Respondent’s behalf on personnel matters, including discipline and discharge. See *Comau, Inc.*, 358 NLRB No. 73, slip op. at 3 (2012) (explaining that the Board’s test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.)

²⁰ Loya denied receiving notice from Aguirre or her family that she was ill from February 1–9, but I have not credited that testimony. Loya’s recordkeeping about Aguirre’s attendance during this time period was riddled with errors, and his memory was equally unreliable. As an example of the errors that Loya made on Aguirre’s attendance record, Loya indicated that Aguirre was out sick on February 11–12, when Aguirre’s time clock punch card clearly shows that Aguirre worked those days. (Compare GC Exh. 3 with R. Exh. 2; see also Tr. 262–263, 290 (Loya admitted making errors on GC Exh. 3).)

turned in a doctor's note to Loya on February 19. When Loya asked why Aguirre hadn't called in about her absence on February 18, Aguirre responded that she believed the doctor's note was sufficient. Loya did not respond further about the issue. (Tr. 324–325; GC Exh. 10.)

c. Schrum and Loya discuss which employees to retain after March 1

As the plan for Schrum to purchase Farm Fresh was coming together, Schrum began speaking with Loya in February 2013 about which employees to retain. Relying on Loya (as well as Aguirre's time card), Schrum concluded that he should not retain Aguirre because of her track record of "multiple" tardies and no call/no shows.²¹ Schrum and Loya also identified employees E.G., A.H., I.R., M.T. and L.T. as employees who should not be retained because they were not doing a good job. (Tr. 84–85, 89–90, 248–250, 645, 664–665, 716, 719; see also Tr. 90 (Schrum considered a no call/no show to be a day that Aguirre did not provide a doctor's excuse or let Respondent know that she would not be coming in).) Notwithstanding Schrum's and Loya's plan to terminate Aguirre, Aguirre began working for Respondent on March 1 along with all of the other preexisting employees. (Tr. 85–86; see also Tr. 316 (on March 4, at Loya's direction, Aguirre filled out assorted paperwork to allow her to work).)

d. March 6 – Respondent terminates Aguirre

On March 6, Aguirre reported to the Farm Fresh facility to begin her shift. While Aguirre was putting things away in her locker, Loya approached and, with Schrum's authorization, told Aguirre that due to changes in the Company, she was no longer needed and accordingly was being let go. Loya did not tell Aguirre that she was being terminated because of her performance, attendance, or no call/no shows.²² (Tr. 92, 95–96, 215–216, 248, 253, 270–271, 287–288, 322–323; see also GC Exh. 3, page 2 (Aguirre's attendance record, on which Loya wrote "She was no longer needed. Let go").) It is undisputed that Schrum relied on Loya's recommendation that Aguirre be terminated. (Tr. 719.) As of the trial date in this case, Respondent had not terminated any of the other employees that Schrum and Loya identified in February as employees who should not be retained.²³ (Tr. 251, 253, 665, 716.)

²¹ Schrum asserted at trial that Aguirre had six no-call/no-shows in February. Aguirre's attendance record, however, only shows one (at most) no-call/no-show on February 18. Aguirre presented a doctor's note on February 19 to explain her absence on February 18. (Tr. 84; GC Exh. 3, 10.)

²² I have not credited Loya's testimony that he also told Aguirre she was being terminated because she was not doing a good job and was having problems with tardies and no calls/no shows. Loya did not offer that testimony until prompted by closed and leading questions, and thus I did not find his additional explanations for Aguirre's termination to be credible. (Tr. 285–286.)

²³ Schrum asserted that he did not fire the other employees slated for not being retained because: (a) he lost other employees due to the E-Verify process and could not afford to lose additional workers; and (b) the litigation in this case has made him fearful of taking employment action against anyone. (Tr. 89, 716, 719, 729.) I do not credit those explanations. Respondent hired multiple employees shortly after

e. Disparate treatment evidence

No Farm Fresh employee (besides Aguirre) has ever been disciplined or fired for being late to work. (Tr. 153–154, 327, 365.) Instead, Farm Fresh has at most addressed tardiness by giving a verbal warning to the employee. (Tr. 153–154.) Indeed, Aguirre and Morales saw multiple employees arrive late, and generally Loya's only response (if any) would be to tell the employees to get to work. (Tr. 365, 516–517; see also Tr. 641, 664–665 (Loya admitted that employees A.H., I.R., L.T. and M.T. had problems with coming to work on time, but were not discharged).)

3. Sylvia Romero

Sylvia Romero began working for Farm Fresh as a production employee in January 2006. Romero worked approximately 52 hours per week (Monday through Saturday), and typically worked from 5 a.m. until 2 or 2:30 p.m. (Tr. 367–369.)

In the early morning on March 6, Romero was at home and getting ready to go to work when her mother-in-law (Aguirre) called and reported that she had been fired. Romero became worried about her own status, and accordingly called Loya to find out if she still had a job. Loya confirmed that he had fired Aguirre, and stated that Romero was also fired because under the new rules there was no more work for her. (Tr. 394, 396, 399, 571, 587.) Loya informed Schrum that Romero resigned because she would not be able to pass the E-Verify process, and Schrum relied on Loya's report.²⁴ (Tr. 708; see also R. Exh. 6 (indicating that Romero quit on March 6).)

F. Other Employees Resign

By on or about March 6, Respondent believed that at least two employees (employees E.d.R. and F.S.) were going to quit because they could not pass the E-Verify process. At the time of trial in this case, both E.d.R. and F.S. had left their jobs with

March 1, and did so in numbers that would have compensated for the loss of the alleged discriminatees in this case plus the additional employees that Schrum and Loya wished to terminate (or not hire). (Tr. 734–735 (Schrum admitted that since early March, Respondent has hired 5–10 new employees).) And, to the extent that the litigation in this case has made Schrum reluctant to take employment action against additional employees, I note that the unfair labor practice charge in this case was filed on March 14, a full two weeks after Schrum became the owner of Farm Fresh and had the authority and discretion to hire and fire employees. (GC Exh. 1(a).)

²⁴ I have not credited Loya's testimony that Morales, Romero and Pena each told him that they were resigning because they could not pass the E-Verify process. See Findings of Fact (FOF), Section II(E), supra (Morales and Romero) and Section II(H)(1), infra (Pena). First, Loya gave inconsistent (and often conflicting) accounts of the dates when Morales and Romero allegedly told him they were going to resign rather than go through E-Verify, and where those conversations occurred. (Compare: Tr. 271–272 and 668–669 (Loya gave conflicting dates about when Romero resigned); Tr. 273–274 and 670, 672 (same, regarding Morales).) Second, Loya initially gave very vague descriptions about what Morales, Pena and Romero said (and where they were) when they resigned, and then gave more detailed, but strikingly similar descriptions of the resignations when recalled testify later in the trial. (See Tr. 271–275, 668–670.) In light of those deficiencies, I did not find Loya credible when he testified that Pena, Morales and Romero resigned.

Farm Fresh. (Tr. 225–226, 652, 690–693, 709; see also Tr. 709 (noting that each employee told Schrum directly that they planned to resign because they could not pass the E-Verify process).)

G. March 6–8: The Union Organizing Campaign and Farm Fresh's Response

1. March 6

On March 6, Sanchez received a call from Ricardo, who reported the news that Respondent had terminated Aguirre and Romero. Based on that news, Sanchez responded that he and Ricardo should go to Farm Fresh to continue the organizing campaign. Upon arriving at the Farm Fresh facility, Sanchez stood by a tree in front of the facility. While Sanchez was at that location, Sousa approached and the following conversation occurred:

Sousa: You need to get . . . the hell out of here, this is private property.

Sanchez: No I don't, I'm on the street, what are you talking about. I'm from the Union, I have the legal right to be here, who are you?

Sousa: I don't have to give you my name. If you don't get out of here, I'm calling the cops.

Sanchez: You do what you need to do, but I can be here, I have the legal right to be here and give me your name.

Sousa: I ain't giving you shit.

(Tr. 600–602; see also Tr. 228–230.) Later in the day, Sanchez saw Loya, Sousa and Schrum come out to the second floor balcony of the facility on two occasions. Each time that they were on the balcony, Schrum, Loya and Sousa spent 3–4 minutes looking in Sanchez' direction.²⁵ (Tr. 631–632.)

Inside the facility, Loya confronted Pena and Virelas about their union activities. Loya approached Pena while he was in the cooler and stated that he had been told Pena signed a union card. Pena denied doing so, and returned to work. (Tr. 461–462.) On or about March 6, Loya also approached Virelas while he was cleaning one of the machines and asked if Virelas signed a union card. Virelas said that he didn't know anything, and asked Loya who told him that he (Virelas) had signed a card. Loya responded "You see? I know everything about here." Loya added that he was going to run off any employees who supported the union, and that he could no longer do anything for employees and that they should go ask Ricardo for work.²⁶ (Tr. 420–421, 432–434.)

March 8

On March 8, Schrum walked out into the parking area with Yvonne Ortiz, where he encountered Martin Hernandez and Efrain Sanchez, who had returned to Farm Fresh to continue the

union organizing campaign. Hernandez asked to speak to Schrum, and Schrum agreed. In the meeting that followed in Schrum's office, Hernandez asked Schrum to rehire Aguirre, Morales and Romero. Hernandez noted that it was against the law to retaliate against employees for engaging in union activities, and added that if Schrum rehired the three women, he would save a lot of money on attorney's fees. (Tr. 108–110, 525–530, 551, 572–573, 604–607, 711–712; see also Tr. 115–117, 531–532, 612 (on March 11, Schrum told Hernandez to call Schrum's lawyer if he wanted to talk to Schrum again).)

That same day, Ricardo returned to Farm Fresh to assist with the union organizing campaign. While in front of the facility, Ricardo saw Loya, Sousa and Schrum come out to the second floor balcony and observe the Union representatives and Ricardo while they were speaking to employees. (Tr. 573–574; see also Tr. 111; GC Exh. 4.)

H. Pena's and Virelas' Employment with Respondent Ends

1. Roberto Pena

Roberto Pena began working for Farm Fresh as a production employee in 2001. Loya served as Pena's supervisor. (Tr. 449–450.)

On or about March 13, Loya was finishing his shift on the production floor when Loya approached and told Pena that March 13 was Pena's last day of work. Pena thanked Loya and left the facility. Before returning to his home, Pena advised Sanchez that he had been fired. (Tr. 462–463, 613–614; see also Tr. 470–471 (Pena left the facility and did not tell Schrum that Loya had fired him).) Loya wrote "quit" on Pena's attendance record for March 13. (R. Exh. 8.) Schrum relied on Loya's report that Pena resigned because he could not pass the E-Verify process. (Tr. 708–709.)

2. Blas Virelas

Blas Virelas began working for Farm Fresh as a production employee in 2002. Virelas worked approximately 48 hours a week (Monday through Saturday), and worked under Loya's supervision. (Tr. 413–414.)

On March 12, 2013, Respondent received a "Notice to Employee of Tentative Nonconfirmation" that was issued by the Social Security Administration as part of the E-Verify process. The notice (a/k/a "no match letter") stated "[t]he name and/or date of birth entered for [Virelas] do not match Social Security Administration records." (R. Exh. 4.; see also Tr. 424–425 (Virelas submitted paperwork to Respondent to use for E-Verify).) The notice also provided instructions about the steps that Respondent and Virelas should take to respond to the notice, including the possible step of contesting the Tentative Nonconfirmation.²⁷ (R. Exh. 4)

On March 12 or 13, Respondent called Virelas to a meeting

²⁵ At some point on March 6, Ricardo joined Sanchez in front of the Farm Fresh facility. (Tr. 574, 602.)

²⁶ Loya did not offer testimony concerning any of these incidents, other than a general denial that he ever threatened employees for engaging in union or protected concerted activities. (Tr. 648.) Loya's general denials, which were given in response to a series of closed questions, were not persuasive, particularly when compared to the specific testimony that Pena and Virelas provided about Loya's statements to them about their union activities.

²⁷ The Acting General Counsel argued that I should draw an adverse inference against Respondent because it did not produce all of the paperwork that came with the no-match letter. (GC Br. at 39.) I decline to draw such an adverse inference because, among other reasons, the Acting General Counsel did not develop the record to show that Respondent had paperwork related to the no-match letter in its possession when the Acting General Counsel requested it, or to show that Respondent should be faulted for not having the additional paperwork.

in the office with Schrum, Loya and Yvonne Ortiz. Using Ortiz as a translator, Schrum told Virelas about the no-match letter from the Social Security Administration, and explained that Virelas had eight working days to clear up the issue, but could continue working at Farm Fresh during the eight-day time period. Virelas responded that he would not be able to clear up the issues raised in the no-match letter, but signed paperwork to contest the letter so he could continue working for the additional eight days. In addition, Virelas asked Schrum to hire Virelas' daughter as an employee since Virelas would not be earning any income after the eight days passed. Schrum agreed to do so. (Tr. 653–654, 709–710; see also Tr. 420, 426–429, 435.) Consistent with the discussion at the meeting, Virelas continued working for Farm Fresh until March 20, and then stopped coming to work. (Tr. 428.)

I. March 14–15: Additional Union Activity at Farm Fresh

1. The Union asserts that it represents a majority of Respondent's employees

On March 14, the Union hand-delivered a letter to Respondent regarding the status of the union organizing campaign. The Union stated as follows:

Mr. Schrum:

We write to inform you that a majority of employees in the following unit has designated this union, UFCW Local 99, to represent them for the purpose of collective bargaining:

All full-time and regular part-time employees employed by Farm Fresh Company at its Phoenix, Arizona production facility, excluding office clerical employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

We hereby demand that you recognize UFCW Local 99 as the exclusive representative of the above-described unit of employees for the purpose of collective bargaining. We further demand that you meet with UFCW Local 99 and bargain in good faith with regard to wages, hours, and other terms and conditions of employment of the above-described unit of employees.

Please contact me to schedule a mutually agreeable time to meet.

3/14/13

Martin Hernandez

(GC Exh. 5; see also Tr. 118–119, 230–232, 532–534, 614–615.)

2. Loya stands in the parking lot as employees leave the facility

After delivering the letter to Respondent on March 14 about the status of the union organizing campaign, Sanchez and Hernandez returned to the street in front of Farm Fresh to talk to employees who would shortly be finishing their shifts and coming outside. While they were waiting, they observed Loya walk into the Farm Fresh parking lot. When employees walked through the parking lot to leave the facility a few minutes later,

Loya waved goodbye to employees as they passed by. Loya went back inside the facility after the first group of employees left the area, but returned outside 30–60 minutes later and said goodbye to a second group of employees that was leaving the facility. Sanchez and Hernandez observed that employees seemed more reluctant to speak with them than on their previous visits to the facility. (Tr. 535–540, 547–548, 615–620; GC Exhs. 14, 15 (photographs of Loya standing in the parking lot); see also GC Exh. 7.)

Sanchez and Hernandez returned to Farm Fresh on March 15 to speak to employees about the Union and to distribute a flyer stating that the Union “filed a Charge with the Federal Government for the unjust termination of some Farm Fresh employees.” Once again, shortly before employees began leaving the facility, Loya walked out to the parking lot and said goodbye to employees when they walked through the parking lot.²⁸ Sanchez and Hernandez again noted that employees seemed reluctant to speak with them. (Tr. 540–543, 547–548, 620–623; GC Exh. 16 (Union flyer).)

J. Schrum Meets with Employees about the Union

From the middle to the latter part of March, Schrum began meeting with groups of 10 employees to express his views about the Union. For each meeting, Loya or an employee brought a group of employees from the production floor up to Schrum's second floor office. At the meeting, Schrum had a Spanish speaking employee translate his remarks, and also read from a Power Point presentation that was written in English and had a written Spanish translation.²⁹ The English Power Point presentation stated as follows:

Facts about Unions.

Unions can mislead or lie to you!

I am bound by law to tell the truth.

History of Union

In 1945 Unions represented 35.5% of private sector workforce

In 2012 Unions represented just 6.6% of private sector workforce

Reason for decline of Unions

The government has adopted laws and regulations to protect employees' rights such as minimum wage.

Many employees have realized that there is no real need for

²⁸ I did not credit Loya's testimony that he habitually went outside at the end of the workday to say goodbye to employees. (See Tr. 277–278, 655.) The record shows that Loya generally dismissed employees by making an announcement over the intercom, and then went outside (if at all) to load cardboard and other recycling materials into his truck, or occasionally to meet delivery trucks. (Tr. 276–277, 279, 509–510, 577–578, 655.) In addition, multiple witnesses credibly testified that Loya did not have a practice of going outside to say goodbye to all employees. (Tr. 235, 464–465, 495–496, 615–616.) To the extent that Loya testified that he did have a practice of saying goodbye to all employees, that testimony was not credible because Loya only offered it as an afterthought in response to closed questions. (See Tr. 277–278, 655.)

²⁹ The Spanish translation of the Power Point presentation was not available at trial because Schrum was not able to save the Spanish translation on his computer. (Tr. 121–122.)

unions anymore
Union No

Unions are not “Charities”

Unions make money from their members paying dues.
UFCW Union Organizer Martin Hernandez, was paid over \$110,000.00 last year!

The Union cannot guarantee anything

Unions cannot guarantee
Higher wages;
More vacation

They can only ask me for that stuff. It is still my decision to agree or not to agree!

If anyone has told you differently, they are **not telling you the truth!**

The facts are, employees can get:

Same
More
Less

If anyone has told you differently they are LYING!!!

Remember I am bound by law to tell you the TRUTH! I am not trying to sell you anything!

There is no “open door policy” with a union

All discussions regarding your terms and conditions of employment have to go through [the] union. We cannot deal with you directly.

Unions want your money

If you join the union and become a member, the union could ask you to pay dues but cannot guarantee you higher wages.
In 2011, UFCW Local 99 members paid between \$7 and \$12/week in dues to the Union.
That is between \$350–\$600/year!

Unions have their own set of rules

Union members are bound to follow the rules in the Union’s constitution and bylaws
Union members can be fined for not following rules

Going on strike/Facts about going on strike!

You will not be paid any wages by company if you go on strike

You will not be able to collect unemployment while on strike
The company can hire replacement workers and the striking employees could get their job back only if there is an opening

Unions are typically against overtime

Unions usually want to have more employees hired by the Company than have employees work overtime
More employees = More money
Remember, unions are NOT charities

What the company must do

Under the law the company must bargain with the union in “good faith”.
The company doesn’t have to agree to any of the Union’s demands

Union impact: The Union Track Record (1983–2010)

Overall U.S. manufacturing jobs down 30%
Union-free manufacturing jobs down 14%
Union manufacturing jobs down 73%

Once a Union gets into a company

It is almost impossible to get rid of a union once they are in.
Give me a chance first!

If you are unhappy down the road, you can always bring in the union then.

If you have changed your mind or feel like you were misled

You can go to the National Labor Relations Board and explain what happened to you. [NLRB Phoenix address and telephone number provided]

If you have any problems with me. Please take it out on my son! [photograph of Schrum’s son printed on the same page]

This is his car [photograph of Schrum’s son’s car printed on the same page]

(GC Exh. 6 (emphasis in original); see also Tr. 119–125, 234, 720.) Schrum also told employees at the group meetings that they have every right to speak to the Union if they desired. (Tr. 122.)

K. Schrum Speaks to Rosa Loya in Response to Employee Complaints

On or about March 26, Schrum went to the Loya’s home to speak to Rosa Loya about several complaints that employees raised (in Schrum’s one-on-one meetings) about her conduct on the production floor. When Schrum advised Rosa that he wanted to reassign her to a different part of the production floor, Rosa decided to quit instead.³⁰ (Tr. 101–103, 200, 205–207, 726.)

Legal Standards

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party’s failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is

³⁰ After hearing Rosa’s decision to quit, Loya told Schrum that he did not want to be production supervisor any more. Loya therefore switched to a maintenance position at Farm Fresh. However, at the time of trial, Loya was still training another employee who had been selected to be the new production supervisor. (Tr. 102–106, 207–211, 238–239.)

the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

B. Section 8(a)(1) Violations

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Station Casinos, LLC*, 358 NLRB No. 153, slip op. at 18 (2012).

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Station Casinos, LLC*, supra (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park 'N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

C. Section 8(a)(3) Violations

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enf'd. 577 F.3d 467 (2d Cir. 2009); see also *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 14 (2012) (observing that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation").

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enf'd. 646 F.3d 929 (D.C. Cir. 2011); *Consolidated Bus Transit, Inc.*, 350 NLRB at 1066; *Pro-Spec Painting*, 339 NLRB at 949. The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an

unlawful motive—at least where the surrounding facts tend to reinforce that inference.) (citation omitted); *Frank Black Mechanical Services*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel"). However, a respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 13.

The *Wright Line* standard does not apply where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act. In such a case, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. Specifically, when an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 13 (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

IV. DISCUSSION AND ANALYSIS

A. Credibility Findings

My credibility findings are generally incorporated into the findings of fact that I set forth above. My observations, however, were that the Acting General Counsel's witnesses were generally candid and credible, except for when they testified about matters that were beyond the scope of their personal knowledge. Of Respondent's witnesses, Schrum and Sousa were generally credible except for a few specific instances that I highlighted in the findings of fact. Loya, by contrast, had very limited credibility because he often required prompts (in the form of leading or closed questions) to guide him through his testimony, and he also provided inconsistent testimony when asked to describe certain pivotal events (such as when and how employees allegedly resigned).

B. Did Respondent Violate the Act by Terminating the Alleged Discriminatees?

In the complaint that it filed in this case, the Acting General Counsel asserted that Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging five discriminatees. Specifically, the Acting General Counsel asserted that Respondent: (a) unlawfully caused the discharge of Aguirre, Morales, Pena and Romero by requiring existing employees to submit new I-9 forms "in order to reverify their work authorization through the E-Verify system"; and (b) unlawfully caused Virelas' discharge by informing him that Respondent "had received a no-match letter from the Social Security Administra-

tion,” and giving Virelas one week to resolve the discrepancy. (See GC Exh. 1(d), (f), pars. 5, 7.)

In its posttrial brief, however, the Acting General Counsel designated its constructive discharge theory as a backup theory, and instead argued that Respondent violated Section 8(a)(3) and (1) by terminating the five discriminatees because they engaged in union and/or protected concerted activities. (See GC Posttrial Br. at 32–39.)

Although the Acting General Counsel did not amend the complaint to conform to its revised legal theories regarding the five discriminatees, I will consider each of the Acting General Counsel’s theories where appropriate. It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enf’d. 920 F.2d 130 (2d Cir. 1990)). That standard is satisfied here because the parties fully litigated whether and how the discriminatees were discharged.

1. Martha Aguirre

The discharge allegations in this case are each covered by the familiar standard set forth in *Wright Line*, discussed above. Applying that standard, I find that the Acting General Counsel made an initial showing that Aguirre’s protected and union activities were a motivating factor in her discharge. Aguirre engaged in protected activity on February 16 when she joined Morales in protesting Loya’s decision to assign them the difficult task of carrying 150 pound barrels of celery. Respondent, through Loya, was certainly aware of that protected activity since Aguirre and Morales complained to Loya directly. (Findings of Fact (FOF), Section II(B)(2).) The record also establishes that Aguirre was one of the first employees to speak to the Union (on February 26). Although Respondent initially was not aware of Aguirre’s communications with the Union, that changed on March 5 when Loya and Sousa saw Aguirre’s son Ricardo working with Union representatives to talk to employees outside the Farm Fresh facility. (FOF, Section II(D)(3)(b).) I find that after observing Ricardo’s activities, Loya deduced that Aguirre (and Romero, Ricardo’s wife) were also supporting the Union. And, contrary to Respondent’s argument that Schrum was not aware of Aguirre’s union activities when he agreed with Loya that Aguirre should be terminated (see R. Brief at 16–17), I find that Loya’s knowledge of Aguirre’s union activities (and her protected activities on February 16) is imputed to Schrum and Respondent because Loya had direct input into the decision to terminate Aguirre. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3 (2011) (explaining that “the Board’s case law is clear that the anti-union motivation of a supervisor will be imputed to the decision making official, where the supervisor has direct input into the decision”). Finally, the Acting General Counsel presented sufficient evidence of animus in the form of suspicious timing of Aguirre’s discharge.³¹ Indeed, Respondent discharged Aguirre on March 6,

within hours of seeing her son Ricardo assisting Union representatives with the organizing campaign outside the facility. (FOF, Section II(E)(2)(d).)

As an affirmative defense, Respondent contends that it discharged Aguirre because of her history of tardy arrivals and no-call/no-shows. While it is true that Aguirre had a history of arriving late to work (typically by a few minutes), the record shows that Respondent tolerated that behavior not only from Aguirre, but also from other employees. To be sure, Loya would verbally admonish employees for being late, but that was the extent of the response. Respondent did not discipline employees for being tardy, let alone discharge them altogether. In addition, the record falls well short of showing that Aguirre had a history of no-call/no-shows. The only no-call/no-show reflected in the record occurred on February 18, when Aguirre did not come in to work because she was at the doctor’s office. Even then, Aguirre explained her absence by presenting a doctor’s note the next day (February 19). Neither Loya nor Prince took action against Aguirre based on her February 18 absence, and nor did Schrum once he became the Company owner on February 28. Finally, when Respondent discharged Aguirre on March 6, Loya only stated (to Aguirre and on Aguirre’s attendance record) that Aguirre was no longer needed. Respondent made no reference at all to Aguirre’s tardy arrivals or to any alleged no-call/no-shows, thereby indicating that those attendance issues were not the reasons for Aguirre’s discharge. (FOF, Section II(E)(2)(b), (d)–(e).) I therefore find that Respondent’s explanation for Aguirre’s discharge is a pretext for discrimination, and I find that Respondent violated Section 8(a)(3) and (1) of the Act because it discharged Aguirre because of her union and protected activities.

2. Maria Morales

While Respondent admitted that it discharged Aguirre, it maintains that the other alleged discriminatees in this case simply resigned their jobs because of the E-Verify process. In so arguing, Respondent essentially maintains that it did not violate the Act because it did not take any adverse employment action against Morales, Pena, Romero or Virelas.

As indicated in the Findings of Fact, however, I did not credit Loya’s testimony that Morales (or Pena or Romero) resigned because Loya’s testimony on that issue was not believable. Specifically, I found that Loya’s testimony about Morales’ alleged resignation was riddled with material inconsistencies and contradictions about when Morales resigned, and what she purportedly said to Loya when she announced her intention to resign. In light of the deficiencies in Loya’s testimony, and Morales’ credible testimony about being discharged, I found that Respondent discharged Morales when Loya told her on March 5 that she did not have any more work with Respondent. (FOF, Section II(E)(1), (3) (fn. 24)).

Turning, then, to the question of whether Respondent violated the Act when it discharged Morales, I find that the Acting General Counsel made an initial showing that Morales’ protect-

³¹ Although they occurred after Aguirre was discharged, the Section 8(a)(1) violations that Respondent committed also support a finding of animus. (See Analysis Section C(1)–(3), *infra* (discussing instances where Respondent unlawfully: interrogated employees about their

union activities; threatened adverse consequences for supporting the Union; created an impression of surveillance; and engaged in surveillance of employees).

ed activities were a motivating factor in her discharge.³² Morales challenged Loya's authority on February 10 (the day that Loya threw celery in Morales' face), prompting Loya to warn Morales that circumstances would be different after March 1. In addition, Morales engaged in protected activity on February 16 when she: (a) protested Loya's direction that only she, Aguirre and one other employee carry 150 pound barrels of celery (instead of rotating that assignment among six employees, as was the usual practice); and (b) warned Loya that she would find laws and rules that applied to Loya. Respondent, through Loya, was aware of that protected activity since Morales complained to Loya directly on February 16. Thus, although the Acting General Counsel did not show that Respondent was aware of Morales' union activities,³³ I find that Loya was emboldened by the change in ownership on March 1 to discharge Morales because of her February 16 protected activities (with animus demonstrated by Loya's remarks to Morales on February 10 and 16, and by the suspicious timing of Morales' discharge).³⁴ (FOF, Section II(B)(2), (D)(1)-(2), (3)(b).)

Since the Acting General Counsel made an initial showing that Respondent discharged Morales because of her protected activities, and since Respondent did not offer an affirmative defense (having contended instead that Morales resigned voluntarily), I find that the Acting General Counsel established that Respondent violated Section 8(a)(1) of the Act when it discharged Morales on March 5.³⁵

3. Roberto Pena

As noted above, Respondent contended that it did not discharge Pena, and that instead, Pena resigned to avoid going through the E-Verify process. I did not credit Loya's testimony that Pena resigned because Loya's testimony on that issue was

not believable. Specifically, as with Morales, I found that Loya's testimony about Pena's alleged resignation was riddled with material inconsistencies and contradictions about when Pena resigned, and what Pena purportedly said to Loya when he announced his intention to resign. In light of the deficiencies in Loya's testimony, and Pena's credible testimony about being discharged (as corroborated by Sanchez), I found that Respondent discharged Pena on March 13 when Loya told Pena that March 13 would be his last day of work for Respondent. (FOF, Section II(H)(1); see also FOF, Section II(E)(3) (fn. 24).)

On the issue of whether Respondent violated the Act when it discharged Pena, I find that the Acting General Counsel made an initial showing that Pena's union activities were a motivating factor in his discharge. There is no dispute that Pena engaged in union activities by, among other things, signing a Union authorization card on March 5 after speaking with Union organizers in front of the Farm Fresh facility that day. Respondent was aware of Pena's activities because Loya and Sousa went outside the facility on March 5 to observe what was happening precisely when Pena was talking to Union organizers. Any doubt that Loya knew Pena was supporting the Union was resolved on March 6, when Loya advised Pena that he had been told that Pena signed a Union authorization card. Loya's questioning of Pena about his union activities demonstrated animus, as did the suspicious timing of Pena's discharge, which occurred 8 days after he signed a Union authorization card. (FOF, Section II(D)(3)(b), (G)(1); see also Analysis Section C(1), (3), *infra* (noting that Loya's questioning of Pena on March 6 also violated Section 8(a)(1) of the Act); fn. 31, *supra* (noting that animus is also shown by the Section 8(a)(1) violations that Respondent committed).)

Since the Acting General Counsel made an initial showing that Respondent discharged Pena because of his protected activities, and since Respondent did not offer an affirmative defense (having contended instead that Pena resigned voluntarily), I find that the Acting General Counsel established that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Pena on March 13.

4. Sylvia Romero

As with Morales and Pena, Respondent contended that Romero voluntarily resigned to avoid going through the E-Verify process. Once again, I did not credit Loya's testimony that Romero resigned because Loya's testimony on that issue was not believable. Loya's testimony about Romero's alleged resignation was riddled with material inconsistencies and contradictions about when Romero resigned, and what Romero purportedly said to Loya when she announced her intention to resign. In light of the deficiencies in Loya's testimony, and Romero's credible testimony about being discharged (as corroborated by Ricardo), I found that Respondent discharged Romero on March 6 when she called Loya to see if she still had a job. (FOF, Section II(E)(3).)

I also find that the Acting General Counsel made an initial showing that Romero's protected and union activities were a motivating factor in her discharge. The record establishes that Romero (along with Aguirre) was one of the first employees to speak to the Union (on February 26). Although Respondent

³² The discipline or discharge of an employee violates Section 8(a)(1) of the Act if the employee was engaged in activity that is "concerted" within the meaning of Section 7 of the Act, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected, concerted activity. *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2 (2010). If the General Counsel makes such an initial showing of discrimination, then the respondent may present evidence, as an affirmative defense, demonstrating that it would have taken the same action even in the absence of the employee's protected activity. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997).

³³ There is no dispute that Morales attended two Union meetings (on March 2 and 4) and spoke to her coworkers about supporting the Union. (FOF, Section II(D)(1)-(2).) However, the Acting General Counsel did not show that Respondent was aware that Morales engaged in those activities. I also note that Union organizers did not arrive at Farm Fresh on March 5 until after Morales had been discharged. (FOF, Section II(D)(3)(b), (E)(1) (noting that Morales was discharged at approximately 7 a.m. on March 5, and that Union organizers arrived at Farm Fresh at approximately 11 a.m. that same day).)

³⁴ I note that, consistent with my finding that Loya was emboldened by the March 1 change in ownership, Loya actually wrote on Morales' attendance record that Morales quit on March 2, even though she worked after that date. (FOF, Section II(E)(1).)

³⁵ To the extent that the Acting General Counsel also alleged that Morales' discharge violated Section 8(a)(3) of the Act, I recommend that the Section 8(a)(3) allegation be dismissed.

initially was not aware of Romero's communications with the Union, that changed on March 5 when Loya and Sousa saw Romero's husband Ricardo working with Union representatives to talk to employees outside the Farm Fresh facility. (FOF, Section II(D)(3)(b).) I find that after observing Ricardo's activities, Loya deduced that Romero (and Aguirre, Ricardo's mother) were also supporting the Union. Finally, the Acting General Counsel presented sufficient evidence of animus in the form of suspicious timing of Romero's discharge. Respondent discharged Romero on March 6, within hours of seeing Ricardo assisting Union representatives outside the facility, and within minutes of also discharging Aguirre. (FOF, Section II(E)(3); see also fn. 31, *supra* (noting that the Section 8(a)(1) violations that Respondent committed shortly after March 6 support a finding of animus).)

Since the Acting General Counsel made an initial showing that Respondent discharged Romero because of her protected activities, and since Respondent did not offer an affirmative defense (having contended instead that Romero resigned voluntarily), I find that the Acting General Counsel established that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Romero on March 6.

5. Blas Virelas

Finally, Respondent contended that Virelas voluntarily resigned rather than complete the E-Verify process. In contrast to the other discriminatees, I find that Virelas indeed did voluntarily resign his job at Farm Fresh. The evidentiary record³⁶ shows that on March 12, Respondent notified Virelas that it received a "no-match" letter from the Social Security Administration that stated that the name and/or date of birth provided for Virelas did not match Social Security Administration records. Respondent also advised Virelas that he had the option of working for an additional 8 days while he attempted to clear up the issue. Virelas signed paperwork to contest the no-match letter, but admitted that he did so only to ensure that he could work for an additional week. Virelas did not actually contest the issues raised in the no-match letter, and voluntarily stopped coming to work after March 20, when the eight-day period for responding to the no-match letter expired.³⁷ (FOF, Section II(H)(2).)

Since Virelas resigned, the Acting General Counsel is forced to rely on its alternate theory that Respondent violated the Act by essentially using the E-Verify process and no-match letter to bring on Virelas' resignation because Virelas engaged in union activities. "Two elements must be proven to establish a constructive discharge. First, the burdens imposed on the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to

resign. Second, it must be shown that those burdens were imposed because of the employee's union activities." *Adscon, Inc.*, 290 NLRB 501, 502 (1988).

Here, the record establishes that after Schrum spoke with the Department of Homeland Security, he understood that as the new owner of Farm Fresh, he had the option of either running all existing employees through the E-Verify system, or alternatively allowing all existing employees to continue working without going through E-Verify. Given those options, Schrum decided to run all existing employees through E-Verify, and announced that decision to employees on March 1 (at the same meeting where employees learned Schrum would be buying Farm Fresh). In light of those facts, and the fact that Respondent did not learn of the union organizing campaign until March 5,³⁸ I find that the Acting General Counsel failed to show that Respondent decided to run employees through the E-Verify system for the purpose of forcing certain employees to resign, or because of the union activities of certain employees.³⁹ (See FOF, Section II(C)(2)–(3), (D)(3)(b).) Accordingly, the Acting General Counsel fell short with its argument that Virelas was constructively discharged, and I recommend that the complaint allegations regarding Virelas' departure from the Company be dismissed. (See GC Exh. 1(c), pars. 5(e)–(g).)

C. Did Respondent Engage in Conduct that Violated Section 8(a)(1) of the Act?

1. Interrogation

Allegations of interrogation must be decided on a case-by-case basis to determine whether an employer's questioning of employees, under all the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Stabilus, Inc.*, 355 NLRB 836, 850 (2010). To make that assessment, the Board considers such factors as whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and the truthfulness of the reply. *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 13–14 (2010); *Stabilus, Inc.*, 355 NLRB at 850; *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Under this test, either the words themselves, or the

³⁶ Regarding Virelas' resignation, the evidentiary record includes not only Loya's testimony, but also Schrum's and Virelas'. In contrast to the other discriminatees, Schrum was actually present when Virelas conceded that he could not resolve the issues in the no-match letter. Virelas also made several admissions that corroborated Schrum's and Loya's testimony about Virelas' resignation.

³⁷ To ease the financial blow of resigning his job at Farm Fresh, Virelas asked Schrum to hire Virelas' daughter as an employee. Schrum agreed to do so.

³⁸ I have considered the fact that Aguirre and Morales engaged in protected concerted activity on February 16, and that Loya was aware of that activity. The Acting General Counsel did not show, however, that Respondent decided to run its employees through the E-Verify system because of Aguirre's and Morales' protected activity on February 16, or that Respondent intended to use the E-Verify system as a mechanism to force undesired employees to resign. To the contrary, as the new owner of the Company, Schrum reasonably decided to run employees through E-Verify to ensure that his employees were authorized to work.

³⁹ In addition, I do not find that Loya's questioning of Virelas (on March 6) about his union activities rose to the level of making working conditions so difficult and unpleasant that Virelas was forced to resign. (See FOF, Section II(G)(1).) Although Loya's questioning of Virelas violated Section 8(a)(1) of the Act (see Analysis Section (C)(1), (3), *infra*), the Acting General Counsel did not show that a reasonable person subjected to that questioning would have been unable to continue working at the facility.

context within which they are used, must suggest an element of interference or coercion. *Stabilus, Inc.*, supra at 850.

In this case, the Acting General Counsel alleges that on or about March 6, Respondent (through Loya) unlawfully interrogated its employees about their union membership, activities and sympathies. I agree. The evidentiary record shows that on March 6, Loya confronted both Pena and Virelas about whether they signed a union card. Loya approached both workers while they were on duty at the facility, and there is no evidence that Loya gave Pena or Virelas any assurances that they could speak freely without fear of reprisal. In addition, Loya's questions went directly to the issue of whether Pena and Virelas were going to support the Union. (FOF, Section II(G)(1).) Under those circumstances, Loya's questioning of Pena and Virelas would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when Loya interrogated Pena and Virelas on March 6. (GC Exh. 1(c), par. 4(b)(1).)

2. Threats of adverse consequences for supporting the Union

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages or other working conditions if they support the union. *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 1 (2010). That principle holds true even if the employer does not specify the specific nature of the reprisal—the mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). *Id.*, slip op. at 14.

The Acting General Counsel asserts that Respondent threatened employees with adverse consequences for supporting the Union on or about March 8 and 26. (GC Exh. 1(c), pars. 4(c)(2)–(4), 4(f)(2) (alleging threat of discharge, threat of refusing to assist employees, and actually refusing to assist employees).) The record shows that on or about March 6, Loya told Virelas that he was going to run off any employees who supported the union, and that he could no longer do anything for employees. (FOF, Section II(G)(1).) I find that Loya's statements to Virelas were unlawful threats because they communicated that union supporters risked being fired (or otherwise being “run off”) and also risked losing Loya's assistance on unspecified matters.⁴⁰

Schrum's March 26 statement to employees that, if they went on strike, Respondent could “hire replacement workers and the striking employees could get their job back only if there is an opening” raises slightly more complex legal issues. As a general matter, an employer in the midst of a union organizing campaign may permissibly engage in legitimate campaign propaganda about the merits of union membership, as long as the campaign propaganda is not linked to comments that cross the line set by Section 8(a)(1) and become coercive (from the objective standpoint of the employees, over whom the employer has a measure of economic power). See *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 5 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008); *Wal-Mart Stores*, 352 NLRB 815,

822 (2008); see also Section 8(c) of the Act (stating that the “expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . , if such expression contains no threat of reprisal or force or promise of benefit”). Further, under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer may make lawful predictions of the effects of unionization if the predictions are based on objective facts and address consequences beyond an employer's control. *DHL Express*, 355 NLRB 1399, 1400 (2010); see also *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 1 (noting that an employer may lawfully tell employees that collective bargaining may not necessarily lead to better working conditions for employees).

Applying that legal standard, I find that Schrum's March 26 remarks about the potential consequences of a strike also violated Section 8(a)(1) of the Act. As the Acting General Counsel observed, Schrum misstated the law regarding the rights of employees who go on strike, because he made no distinction between employees who engage in economic strikes (who are not entitled to immediate reinstatement if replaced) and employees who engage in unfair labor practice strikes (who are protected against permanent replacement). See *Spurlino Materials, LLC*, 357 NLRB No. 126, slip op. at 10 (2011) (discussing the difference between economic and unfair labor practice strikes). By essentially telling employees that their jobs would be in jeopardy if they ever went on strike (regardless of the circumstances), Respondent (through Schrum) went beyond its right to make lawful predictions about the effects of unionization, and instead made statements that reasonably would tend to coerce employees in the exercise of their Section 7 rights. I therefore find that Schrum's remarks about the consequences of going on strike violated Section 8(a)(1) of the Act.

In sum, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 4(c)(2)–(3) and 4(f)(2) of the complaint. I recommend that the allegation in paragraph 4(c)(4) of the complaint be dismissed.

3. Surveillance and creating the unlawful impression of surveillance

A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and thereby coercive. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008).

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. *Metro One Loss Prevention Services*, 356 NLRB

⁴⁰ The record does not show that Loya actually refused to assist Virelas on March 6.

No. 20, slip op. at 14; see also *New Vista Nursing & Rehabilitation*, 358 NLRB No. 55, slip op. at 10 (2012) (noting that the standard for creating an unlawful impression of surveillance is met “when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source”); *Flexsteel Industries*, 311 NLRB 257, 257 (1993) (noting that an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee’s union involvement). The standard is an objective one, based on the rationale that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 14.

In this case, the Acting General Counsel alleged that Respondent, through Loya, created an unlawful impression of surveillance on or about March 6 and 8 when he confronted Pena and Virelas about whether they signed union cards. I agree. When Loya spoke to Pena and Virelas, he made statements to each that indicated that he already was aware of their union activities through his sources at the facility. Given Loya’s statements that he already knew Pena and Virelas had signed union authorization cards, a reasonable employee would assume that their union activities had been placed under surveillance. (FOF, Section II(G)(1).) I therefore find that Respondent, through Loya’s conversations with Pena and Virelas on or about March 6, created an unlawful impression of surveillance in violation of Section 8(a)(1) of the Act. (GC Exh. 1(c), pars. 4(b)(2), 4(c)(1).)

I also find that Respondent, through Loya, unlawfully surveilled employees on March 14–15. On each of those days, Loya stood in Respondent’s parking lot and said goodbye to employees as they left the facility (and while Union representatives tried to speak with employees about supporting the union). Notably, Loya made a point of being outside precisely when employees were leaving their shifts, and then returning to the inside of the facility after all employees had left the area. Loya’s behavior on those two days was out of the ordinary. Indeed, before the union organizing campaign began, Loya did not express any real interest in saying goodbye to employees (much less from a position in the parking lot), and instead was content to dismiss employees via intercom and then spend time loading materials into his truck. Since it was not part of Loya’s normal routine to observe employees as they left the facility, and since Loya engaged in surveillance precisely when Union organizers were attempting to speak with employees about the organizing campaign, I find that Respondent’s surveillance of employees was coercive and a violation of Section 8(a)(1) of the Act. (See GC Exh. 1(c), par. 4(e).)

4. Soliciting grievances, promising improved working conditions, and granting increased benefits and pay

Finally, the Acting General Counsel alleges that in one-on-one meetings with employees (starting on March 5 and continuing over the course of the month) and in group meetings with employees (on or about March 26), Respondent violated the Act by soliciting employee complaints and grievances, promis-

ing improved working conditions, and granting increased benefits and pay. (GC Exh. 1(c), pars. 4(d), 4(f)(1), (3).)

Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities. The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); see also *Bally’s Atlantic City*, 355 NLRB 1319, 1326 (2010). An employer who has a past policy and practice of soliciting employees’ grievances may continue such a practice during an organizational campaign without an inference being drawn that the solicitations are an implicit promise to remedy the grievances. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (citing *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003)); *Wal-Mart Stores*, 352 NLRB at 822–823. However, it is also the case that an employer cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation, but rather whether the instant solicitation implicitly promised a benefit. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (citing *American Red Cross Missouri-Illinois*, 347 NLRB 347, 352 (2006)).

In addition, an employer may not promise or grant benefits to employees for the purpose of discouraging union support. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 21. Notably, while the employer’s motive is typically irrelevant to the merits of 8(a)(1) allegations, employer motive *is* relevant to promises or conferral of benefits, as the employer’s motive for conferring a benefit during an organizing campaign must be to interfere with or influence the union organizing. Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act. *Id.* (citing *NLRB v. Exchange Parts*, 375 U.S. 405 (1964) and *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992)); see also *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (explaining that the test in this circumstance is motive-based, and requires the Board to determine whether the record evidence as a whole, including any proffered legitimate reason for the wage increase and promotion offer to the employee, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with the employee’s protected union activity); *Yale New Haven Hospital*, 309 NLRB at 366 (noting that an employer may establish a legitimate business reason for promising or providing benefits to employees by showing that the benefits were granted in accordance with a preexisting established program).

The Acting General Counsel alleges that Respondent ran afoul of each of those legal principles when Schrum conducted one-on-one meetings with employees, beginning on March 5. I disagree. When Schrum became the owner of Farm Fresh, one

of his first steps (on March 1, in an all-employee meeting) was to notify employees that he planned to meet with them one on one to discuss their wages and to answer any questions that employees might have. Regarding wages, Schrum explained that he planned to stop giving employees annual bonuses, but would offset that loss of income by increasing employee hourly wages. Notably, Schrum announced the forthcoming one-on-one meetings and changes to wages well before Respondent learned about the union organizing campaign on March 5. Thus, when Schrum followed through with his plan and began meeting with employees one-on-one to discuss their wages and hear any questions (starting on March 5), it was not in response to the union organizing campaign, but rather the next step in the plan that Schrum outlined on March 1.⁴¹ (FOF, Section II(C)(3), (D)(3).)

Based on those facts, I do not find that Respondent unlawfully solicited grievances or implicitly promised benefits by holding one-on-one meetings with employees. As Respondent's new owner, Schrum announced on his first day (March 1) that he intended to use the one-on-one meetings to solicit grievances from employees (among other purposes for the meetings). Schrum made that announcement before Respondent learned about the union organizing campaign, and I find that Respondent was entitled to follow through with the one-on-one meetings as essentially a preestablished practice of which all employees were aware.⁴² In addition, I do not find that Schrum unlawfully promised or granted increased pay and benefits to employees in the one-on-one meetings. As a preliminary matter, the record shows that Schrum actually cut employee pay for the first year because the hourly wage increases that Schrum offered were less than the yearly bonuses that he simultaneously eliminated. Beyond that point, Schrum told employees about his plan to raise hourly wages and eliminate bonuses on March 1 (before Respondent knew about the union organizing campaign), and explained that the change in wages was necessary because he did not have an accumulated balance of profits in

his accounts to pay bonuses. (FOF, Section II(C)(3).) Since Respondent established a legitimate business reason for raising employee hourly wages and the Acting General Counsel did not show that the wage changes were intended to interfere with or influence the organizing campaign, I find that Respondent did not violate the Act when it followed through with its plan to increase employee hourly wages. Accordingly, I recommend that the allegations in paragraph 4(d) of the complaint be dismissed.

Turning, then, to the mid-March group meetings with employees about the merits of supporting the Union, the Acting General Counsel takes issue with Schrum's Power Point presentation and his statements that employees should "Give me [Schrum] a chance first" before bringing in the Union, and that "if [employees] are unhappy down the road, [they] can always bring in the union then." (FOF, Section II(J).) Respondent correctly points out, however, that the Board has recognized that "generalized expressions of an employer's desire to make things better have long been held to be within the limits of permissible campaign propaganda." *Macdonald Machinery Co.*, 335 NLRB 319, 319 (2001); see also *National Micronetics, Inc.*, 277 NLRB 993, 993 (1985) (employer's generalized request for "another chance" and "more time" did not violate Section 8(a)(1)). I find that Schrum's request that employees give him a chance was also permissible campaign propaganda, particularly where his remarks in the group meetings were not linked to any specific promises to increase benefits or improve working conditions, or any request that employees air their grievances at the meetings.⁴³ Accordingly, I recommend that the allegations in paragraphs 4(f)(1) and 4(f)(3) of the complaint be dismissed.

CONCLUSIONS OF LAW

1. By discharging Maria Morales on March 5, because she engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

2. By discharging Martha Aguirre, Sylvia Romero and Roberto Pena (on March 6 for Aguirre and Romero, and on March

⁴¹ The Acting General Counsel points out that Schrum did not invite any of the discriminatees to attend a one-on-one meeting. (GC Br. at 15.) That fact, however, is not material. Respondent discharged Aguirre, Morales and Romero within one day of beginning its one-on-one meetings—given that timing, it is not surprising that Respondent did not meet with those three discriminatees before they were discharged. Moreover, although Pena and Virelas remained with Respondent for a while longer (until March 13 and 20, respectively), the record shows that Schrum conducted one-on-one meetings with employees throughout the month of March. Since Pena was discharged on March 13 and Virelas began dealing with the no-match letter that same day, it is not surprising that neither was called to attend a one-on-one meeting with Schrum before they left the Company.

⁴² The Acting General Counsel also faults Respondent for acting on certain employee complaints raised in the one-on-one meetings. Specifically, the Acting General Counsel faults Respondent for confronting Ms. Loya on March 26 about her conduct in the workplace. I do not find the Acting General Counsel's argument to be persuasive. In my view, since Respondent learned of the issues with Ms. Loya pursuant to lawful one-on-one meetings with employees, it follows that Respondent was within its rights to act on any grievances that it learned about in those lawful meetings (particularly in the absence of any evidence that it deviated from past practices regarding handling grievances).

⁴³ The cases that the Acting General Counsel cited in its brief (see GC Br. at 49) are distinguishable for precisely this reason – that the employers in the cases cited by the Acting General Counsel did not merely request another chance, but also solicited grievances or promised specific benefits if employees did not unionize. See, e.g., *Overnite Transportation Co.*, 329 NLRB 990, 1011 (1999) (employer's "Give Jim a chance" campaign was unlawful because it was linked to previously awarded benefits and also promises to remedy grievances in the future), *enfd.* in pertinent part, 280 F.3d 417 (4th Cir. 2002); *Acme Bus Co.*, 320 NLRB 458, 463 (1995) (employer's request that employees give him a chance was linked to a promise of an improved wage and benefits package that the employer later unlawfully implemented), *enfd.* 198 F.3d 233 (2d Cir. 1999); *Waste Management of Utah*, 310 NLRB 883, 888 (1993) (finding a violation of Section 8(a)(1) where the employer asked employees to hold off on supporting the union, but also solicited employee complaints and promised solutions to some of those complaints); *Fisher-Haynes Corp. of Georgia*, 262 NLRB 1274, 1275 (1982) (employer's statements that it would "straighten things out" if employees gave it a chance, and that employees "would all be made happy" was linked to a promise of a future raise, and therefore violated Section 8(a)(1)).

13 for Pena), because they engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By interrogating Pena and Virelas on or about March 6, about their union membership, activities and sympathies, Respondent violated Section 8(a)(1) of the Act.

4. By, on or about March 6, threatening to discharge employees because they signed union authorization cards, Respondent violated Section 8(a)(1) of the Act.

5. By, on or about March 6, threatening to refuse to assist employees if they supported the Union, Respondent violated Section 8(a)(1) of the Act.

6. By, on or about March 6, telling employees that it knew they had signed union authorization cards and thereby creating an impression among employees that Respondent had their union activities under surveillance, Respondent violated Section 8(a)(1) of the Act.

7. By, on or about March 14–15, engaging in surveillance of employees' union activities in a manner that was out of the ordinary and coercive, Respondent violated Section 8(a)(1) of the Act.

8. By, on or about mid-March, threatening employees that they could be permanently replaced if they supported the Union and went on strike (regardless of the reason for the strike), Respondent violated Section 8(a)(1) of the Act.

9. The unfair labor practices stated in Conclusions of Law 1–8 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

A. Traditional Remedies

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

B. Special Remedies

In addition to the remedies that I have discussed above, the Acting General Counsel requests that I impose the following special remedies in this case: (a) an order requiring Respondent to read a copy of the Notice that will issue in this case aloud to employees and in Schrum's presence; (b) an order requiring Respondent to allow the Union access to Respondent's bulletin

boards; and (c) an order requiring Respondent to provide the Union with the names and addresses of all of Respondent's employees. (GC Br. at 51–52.) As described in more detail below, I find that some, but not all, of the requested special remedies are warranted.

1. Notice reading

The Board has required that a Notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Marquez Brothers Enterprises*, 358 NLRB No. 61, slip op. at 2 (2012).

Applying that standard, I find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees in Schrum's presence. In particular, as soon as it learned of the union organizing campaign, Respondent took swift and certain action by discharging four union supporters (Aguirre, Morales, Pena and Romero, out of a small bargaining unit of approximately 50 employees), three of whom were the earliest union supporters, and two of whom were related to Ricardo, who openly worked with Union organizers to encourage employees to support the Union. Further, when the organizing campaign continued, Respondent (among other misconduct) openly engaged in surveillance of employees' union activities, and threatened employees with adverse consequences if they supported the union. In light of those actions, I agree that a notice reading is necessary to assure employees that they may exercise their Section 7 rights free of coercion. Accordingly, I will require that the remedial notice in this case be read aloud to employees in English and Spanish by Respondent's owner (Schrum) or, at Respondent's option, by a Board agent in Respondent's owner's presence. *Marquez Brothers Enterprises*, 358 NLRB No. 61, slip op. at 2.

2. Union access to Respondent's bulletin boards and the names and addresses of Respondent's employees

The Acting General Counsel also requested that I order Respondent to give the Union: (a) access to the bulletin boards at its facility (to post information about the Union, the organizing campaign and other related topics); and (b) a list of the names and addresses of Respondent's employees. (GC Br. at 51–52.) I do not find that either of those special remedies is warranted.

As part of its remedy in certain cases, the Board has ordered employers to permit unions reasonable access to company bulletin boards and other locations where notices to employees are customarily kept. As the Board explained, the purpose of granting bulletin board access was to provide employees with the reassurance that they may learn about the benefits of union representation and can enlist the aid of union representatives without fear of being subjected to severe unfair labor practices. *Blockbuster Pavilion*, 331 NLRB 1274, 1276 (2000); *United States Service Industries*, 319 NLRB 231, 232 (1995), *enfd.* 107 F.3d 923 (D.C. Cir. 1997). Similarly, the Board has ordered an employer to give a union a list of the names and addresses of its employees, with the aim of enabling the union to

contact employees outside of the workplace in an atmosphere relatively free of restraint and coercion, thereby leveling the playing field that was tilted by the employer's serious unfair labor practices. *Blockbuster Pavilion*, 331 NLRB at 1275.

While the unfair labor practices in this case were serious, I do not find that they rise to the level of warranting the special remedies of requiring Respondent to give the Union bulletin board access and the names and addresses of Respondent's employees. The Board issued special remedies in *Blockbuster Pavilion* because it found that the substantial passage of time (6 years) after the initial decision and bargaining order rendered the bargaining order unenforceable. The Board therefore ordered special remedies as an alternative method for dissipating the lingering effects of the unfair labor practices that the respondent committed. *Blockbuster Pavilion*, 331 NLRB at 1274-1275. In *United States Services Industries*, meanwhile, the Board determined that special remedies were warranted because of the respondent's history of flagrant and pervasive violations of the Act. 319 NLRB at 231-232 (noting that this was the third Board case documenting the employer's unlawful responses to protected activity).

By contrast, while the violations that Respondent committed in this case were serious, this case lacks the unique circumstances in *Blockbuster Pavilion* and *United States Service Industries* that led the Board to order the special remedies of providing the union with bulletin board access and a list of employee names and addresses. Accordingly, I deny the Acting General Counsel's request for those special remedies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁴

ORDER

The Respondent, Farm Fresh Company, Target One, LLC, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Food and Commercial Workers Union, Local No. 99, AFL-CIO or any other union.

(b) Discharging or otherwise discriminating against any employee for engaging in union or concerted activities protected by Section 7 of the Act.

(c) Interrogating employees about their union membership, activities and sympathies.

(d) Threatening to discharge employees because they signed union authorization cards.

(e) Threatening to refuse to assist employees if they supported the Union.

(f) Telling employees that it knew they had signed union authorization cards and thereby creating an impression among employees that Respondent had their union activities under surveillance.

⁴⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Engaging in surveillance of employees' union activities in a manner that is out of the ordinary and coercive.

(h) Threatening employees that they could be permanently replaced if they supported the Union and went on strike (regardless of the reason for the strike).

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix"⁴⁵ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the

⁴⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice to all current employees and former employees employed by the Respondent at any time since March 5, 2013.

(f) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix" shall be read to employees in both English and Spanish, by Respondent's owner or, at Respondent's option, by a Board agent in Respondent's owner's presence.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 8, 2013

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting the United Food and Commercial Workers Union, Local No. 99, AFL-CIO or any other union.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or concerted activities protected by Section 7 of the Act.

WE WILL NOT interrogate employees about their union membership, activities and sympathies.

WE WILL NOT threaten to discharge employees because they signed union authorization cards.

WE WILL NOT threaten to refuse to assist employees if they support the Union.

WE WILL NOT tell employees that we know they signed union authorization cards and thereby create an impression among employees that we have their union activities under surveillance.

WE WILL NOT engage in surveillance of employees' union activities in a manner that is out of the ordinary and therefore coercive.

WE WILL NOT threaten employees that they could be permanently replaced if they support the Union and go on strike (regardless of the reason for the strike).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Martha Aguirre, Maria Morales, Roberto Pena and Sylvia Romero for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

FARM FRESH CO., TARGET ONE, LLC